Edgenta Mediserve Sdn Bhd v Lembaga Pembangunan Industri Pembinaan Malaysia

HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW APPLICATION NO WA-25–402–12 OF 2020
AHMAD KAMAL J
6 JANUARY 2025

Civil Procedure — Contempt of court — Application for leave to apply for committal order — High Court allowed applicant's application for judicial review against decision of Lembaga Pembangunan Industri Pembinaan Malaysia ('CIDB') in imposing levy — High Court ordered for review/reassessment of payable levy — Applicant failed to provide relevant particulars to CIDB for CIDB to complete review/reassessment of payable levy pursuant to High Court's judicial review order — CIDB imposed new levy with same amount as previous levy which was quashed under judicial review order — Applicant filed application for leave to apply for committal order — Whether application for leave to apply for committal order was premature, abuse of court process and did not disclose a prima facie case for contempt — Rules of Court 2012 O 52 r 3

Under a concession agreement dated 1 April 2015 ('the concession agreement') entered into between the applicant and the Government of Malaysia as represented by the Ministry of Health ('the MOH'), the applicant was appointed to provide the MOH with facility engineering management service ('FEMS'), facility management services ('FMS'), biomedical engineering maintenance services ('BEMS'), cleaning services ('CLS'), healthcare waste management services ('HWMS'), and linen and laundry services ('LLS'). Lembaga Pembangunan Industri Pembinaan Malaysia ('CIDB/the respondent') had imposed a levy in the sum of RM2,957,520.90 on FEMS, BEMS and CLS scope of services under the concession agreement ('the first levy'). The applicant was disagreed with the imposition of the first levy as the applicant alleged that only part of the FEMS services fell within the ambit of 'construction works'. The applicant then filed judicial review application against the first levy imposed by CIDB. At the end of the case, the High Court allowed the judicial review application and made the following orders: (a) an order of certiorari to quash CIDB's decision in imposing the first levy; (b) an order of mandamus for CIDB to complete the review/reassessment of the payable levy; (c) an order that CIDB to refund the first levy to the applicant; and (d) an order that CIDB to pay costs and allocator fee to the applicant ('the JR order'). Despite the existence of the JR order, CIDB's officer known as Zahidi Hashim ('Zahidi') proceeded to issue a letter dated 25 July 2023 informing the applicant that a levy in the sum of RM2,957,520.90 had been imposed on the concession agreement. The levy dated 25 July 2023 was

imposed due to the applicant's failure to furnish the required particulars (for CIDB to determine the levy payable) within the stipulated time. Aggrieved by CIDB's action, the applicant filed the present application ('encl 86') under O 52 r 3 of the Rules of Court 2012 ('the ROC') and/or inherent jurisdiction of the court for leave to commence committal proceedings against CIDB and Zahidi ('the proposed contemnors'). The applicant argued that the proposed contemnors had acted in contempt of the JR order by imposing the levy dated 25 July 2023 because the said levy was identical in value and basis to the first levy, which had been quashed pursuant to the JR order. On this point, it was argued that the JR order mandated that any levy imposed by CIDB should be confined only to the value of construction works under the FEMS scope of services, with the exclusion of loose assets and vehicles.

Held, dismissing the applicant's application for leave to commence committal proceedings against the proposed contemnors with costs of RM5,000 subject to the allocator:

(1) The test required to be met before the leave is granted is that the applicant must satisfy the court that there is a prima facie case of contempt (see para 28).

(2) The court found that: (a) the CIDB had complied with parts of the JR order (paras 3 and 4); (b) the CIDB was not able to complete its compliance with para 2 of the JR order, ie, to complete the review/reassessment of the payable levy, due to the applicant's conduct by failing, refusing and/or neglecting to disclose or furnish the required particulars which were necessary for CIDB to complete the said review/reassessment; (c) the issuance of the levy dated 25 July 2023 was not in contravention of the JR order because the CIDB had, at all material times, informed the applicant that it was pending further particulars from the applicant for the process of review/reassessment to be completed; and (d) there was no specified time provided under the JR order for CIDB to complete the review/reassessment of the payable levy (see paras 34–37).

(3) The court further found that: (a) the applicant's contention that no levy ought to be imposed on the FMS, BEMS, LLS, CLS and HWMS scopes of services was not supported by the express terms of the JR order; (b) the imposition of the levy dated 25 July 2023 was due to the applicant's failure to disclose or furnish further particulars for CIDB to complete the review/reassessment of the payable levy, as such, it was not identical in basis and/or circumstances as the first levy; and (c) the JR order also did not prohibit CIDB from arriving at a levy which was identical in value upon a review/reassessment — on this matter, the court agreed with CIDB that a decision-maker was entitled to reach exactly the same decision by a different route upon the first decision being quashed. Based

on the above findings, the court opined that the grounds raised by the applicant did not relate to the express terms of the JR order nor the spirit of the JR order (see paras 40 & 42–46).

(4) The chronology of facts in the present case clearly showed that the applicant, was at all material times, informed that CIDB's review/reassessment of the payable levy under para 2 of the JR order had not concluded even after the imposition of the levy dated 25 July 2023, and that further particulars were required from the applicant which the applicant failed, refused and/or neglected to provide the same to CIDB. Given the above, the court opined that encl 86 was premature and an abuse of the court process and did not disclose a prima facie case for contempt as it was calculated to prevent the CIDB from exercising its statutory duty under the Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994 (Act 520) (see paras 47–49).

(5) It was the applicant's duty to make full and frank disclosure of all relevant facts in their statement and affidavit under O 52 r 3(2) of the ROC, especially the relevant facts which were favorable to the proposed contemnors. However, the court found that the details and justification provided by CIDB for the issuance of the levy dated 25 July 2023, particularly CIDB's position that the review/reassessment exercise had yet to be completed (despite the issuance of the levy dated 25 July 2023), were not at all disclosed by the applicant. The court opined that the applicant's conduct could be construed as a deliberate suppression of facts and a serious abuse of the court process (see paras 51–52 & 54).

(6) At all material times, CIDB had informed the applicant that it was pending further particulars from the applicant for the process of review/reassessment to be completed. After the issuance of the levy dated 25 July 2023, the applicant was still in communication with CIDB in respect of the required particulars. Given the above, the court was of the view that the applicant was precluded from approbating and reprobating through partially participating in CIDB's review/reassessment process and thereafter contending that CIDB had allegedly breached the JR order by the very same process (see paras 55–56 & 58).

(7) The court opined that the following alternative remedies were available to the applicant: (a) the applicant could provide the required particulars to CIDB; and (b) the applicant could challenge the levy dated 25 July 2023 or the levy issued by CIDB upon the conclusion of the review/reassessment process via other avenues including by way of a fresh judicial review application. The court was of the considered view that contempt of court should be exercised sparingly and the applicant should have resorted to committal proceedings as a last resort (see paras 59–61).

(8) Premised on the reasons above, the court found that the applicant had failed to show a prima facie case of contempt against the proposed contemnors (see para 62).

[Bahasa Malaysia summary

Di bawah perjanjian konsesi bertarikh 1 April 2015 ('perjanjian konsesi tersebut') yang dimeterai antara pemohon dan Kerajaan Malaysia yang diwakili oleh Kementerian Kesihatan ('KKM'), pemohon telah dilantik untuk menyediakan KKM dengan perkhidmatan pengurusan fasiliti kejuruteraan ('FEMS'), perkhidmatan pengurusan fasiliti ('FMS'), perkhidmatan penyelenggaraan kejuruteraan bioperubatan ('BEMS'), perkhidmatan pembersihan ('CLS'), perkhidmatan pengurusan sisa penjagaan kesihatan ('HWMS'), dan perkhidmatan linen dan dobi ('LLS'). Lembaga Pembangunan Industri Pembinaan Malaysia ('CIDB/responden') telah mengenakan levi berjumlah RM2,957,520.90 ke atas skop perkhidmatan FEMS, BEMS dan CLS di bawah perjanjian konsesi tersebut ('levi pertama'). Pemohon tidak bersetuju dengan pengenaan levi pertama tersebut kerana pemohon mendakwa bahawa hanya sebahagian daripada perkhidmatan FEMS termasuk dalam bidang 'kerja pembinaan'. Pemohon kemudiannya memfailkan permohonan semakan kehakiman terhadap levi pertama yang dikenakan oleh CIDB. Pada akhir kes, Mahkamah Tinggi membenarkan permohonan semakan kehakiman dan membuat perintah-perintah berikut: (a) perintah certiorari untuk membatalkan keputusan CIDB dalam mengenakan levi pertama tersebut; (b) perintah mandamus untuk CIDB melengkapkan semakan/penilaian semula levi yang perlu dibayar; (c) perintah supaya CIDB membayar balik levi pertama tersebut kepada pemohon; dan (d) perintah supaya CIDB membayar kos dan bayaran alokator kepada pemohon ('perintah SK'). Walaupun terdapatnya perintah SK tersebut, pegawai CIDB yang dikenali sebagai Zahidi Hashim ('Zahidi') telah bertindak mengeluarkan surat bertarikh 25 Julai 2023 memaklumkan pemohon bahawa levi berjumlah RM2,957,520.90 telah dikenakan ke atas perjanjian konsesi tersebut. Levi bertarikh 25 Julai 2023 tersebut telah dikenakan kerana kegagalan pemohon untuk memberikan butiran yang diperlukan (untuk CIDB menentukan levi yang perlu dibayar) dalam masa yang ditetapkan. Terkilan dengan tindakan CIDB, pemohon memfailkan permohonan semasa ('lampiran 86') di bawah A 52 k 3 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') dan/atau bidang kuasa sedia ada mahkamah untuk kebenaran memulakan prosiding pengkomitan terhadap CIDB dan Zahidi ('penghina-penghina yang dicadangkan'). Pemohon berhujah bahawa penghina-penghina yang dicadangkan telah bertindak menghina perintah SK tersebut dengan mengenakan levi bertarikh 25 Julai 2023 kerana levi tersebut mempunyai nilai dan asas yang sama dengan levi pertama, yang telah dibatalkan menurut perintah SK tersebut. Mengenai perkara ini, telah dihujahkan bahawa perintah SK tersebut memberi mandat bahawa apa-apa levi yang dikenakan oleh CIDB harus dihadkan hanya kepada nilai kerja

pembinaan di bawah skop perkhidmatan FEMS, dengan mengecualikan aset dan kenderaan mudah alih.

Diputuskan, menolak permohonan pemohon untuk kebenaran untuk memulakan prosiding pengkomitan terhadap penghina-penghina yang dicadangkan dengan kos RM5,000 tertakluk kepada alokator:

(1) Ujian yang perlu dipenuhi sebelum kebenaran diberikan ialah pemohon hendaklah memuaskan hati mahkamah bahawa terdapat kes prima facie penghinaan (lihat perenggan 28).

(2) Mahkamah mendapati bahawa: (a) CIDB telah mematuhi sebahagian perintah SK tersebut (perenggan 3 dan 4); (b) CIDB tidak dapat melengkapkan pematuhannya kepada perenggan 2 perintah SK tersebut, iaitu, untuk menyelesaikan semakan/penilaian semula levi yang perlu dibayar, disebabkan oleh kelakuan pemohon yang gagal, enggan dan/atau mengabaikan untuk mendedahkan atau memberikan butiran-butiran lanjut yang berkaitan yang diperlukan untuk CIDB menyelesaikan semakan/penilaian semula tersebut; (c) pengeluaran levi bertarikh 25 Julai 2023 tersebut tidak melanggar perintah SK tersebut kerana CIDB telah, pada setiap masa yang material, memaklumkan pemohon bahawa ia sedang menunggu butiran lanjut daripada pemohon untuk menyelesaikan proses semakan/penilaian semula tersebut; dan (d) tiada masa tertentu yang diperuntukkan di bawah perintah SK tersebut untuk CIDB menyelesaikan semakan/penilaian semula levi yang perlu dibayar (lihat perenggan 34–37).

(3) Mahkamah selanjutnya mendapati bahawa: (a) dakwaan pemohon bahawa tiada levi patut dikenakan ke atas skop perkhidmatan FMS, BEMS, LLS, CLS dan HWMS tidak disokong oleh terma-terma nyata perintah SK tersebut; (b) pengenaan levi bertarikh 25 Julai 2023 adalah disebabkan oleh kegagalan pemohon untuk mendedahkan atau memberikan butiran lanjut untuk CIDB menyelesaikan semakan/penilaian semula levi yang perlu dibayar, oleh itu, ia tidak sama dari segi asas dan/atau keadaan sebagaimana levi pertama; dan (c) perintah SK tersebut juga tidak melarang CIDB daripada menerima levi yang sama nilainya selepas semakan/penilaian semula — berhubung perkara ini, mahkamah bersetuju dengan CIDB bahawa pembuat keputusan berhak untuk mencapai keputusan yang sama melalui laluan yang berbeza apabila keputusan yang pertama telah dibatalkan. Berdasarkan dapatan-dapatan di atas, mahkamah berpendapat bahawa alasan-alasan yang dibangkitkan oleh pemohon tidak berkaitan dengan terma-terma nyata perintah SK tersebut mahupun kehendak tersirat perintah SK tersebut (lihat perenggan 40 & 42–46).

(4) Kronologi fakta dalam kes ini jelas menunjukkan bahawa pemohon, pada setiap masa yang material, telah dimaklumkan bahawa

semakan/penilaian semula CIDB ke atas levi yang perlu dibayar di bawah perenggan 2 perintah SK tersebut belum selesai walaupun selepas pengenaan levi bertarikh 25 Julai 2023 tersebut, dan butiran lanjut diperlukan daripada pemohon, namun, pemohon gagal, enggan dan/atau mengabaikan untuk memberikan butiran tersebut kepada CIDB. Memandangkan perkara-perkara di atas, mahkamah berpendapat bahawa lampiran 86 adalah pramatang dan penyalahgunaan proses mahkamah, dan tidak mendedahkan kes prima facie untuk penghinaan kerana ia dikira menghalang CIDB daripada melaksanakan kewajipan berkanunnya di bawah Akta Lembaga Pembangunan Industri Pembinaan Malaysia 1994 (Akta 520) (lihat perenggan 47–49).

(5) Menjadi kewajipan pemohon untuk membuat pendedahan penuh dan terus terang tentang semua fakta yang berkaitan dalam pernyataan dan afidavit pemohon di bawah A 52 k 3(2) KKM 2012, terutamanya fakta-fakta berkaitan yang menguntungkan penghina-penghina yang dicadangkan. Bagaimanapun, mahkamah mendapati butiran dan justifikasi yang diberikan oleh CIDB untuk pengeluaran levi bertarikh 25 Julai 2023, khususnya pendirian CIDB bahawa proses semakan/penilaian semula masih belum selesai (walaupun dengan pengeluaran levi bertarikh 25 Julai 2023 tersebut), sama sekali tidak didedahkan oleh pemohon. Mahkamah berpendapat bahawa kelakuan pemohon boleh ditafsirkan sebagai penindasan fakta yang disengajakan dan merupakan penyalahgunaan proses mahkamah yang serius (lihat perenggan 51–52 & 54).

(6) Pada setiap masa yang material, CIDB telah memaklumkan kepada pemohon bahawa ia sedang menunggu butiran lanjut daripada pemohon untuk menyelesaikan proses semakan/penilaian semula. Selepas pengeluaran levi bertarikh 25 Julai 2023, pemohon masih berkomunikasi dengan CIDB berhubung butiran yang diperlukan. Memandangkan perkara-perkara di atas, mahkamah berpandangan bahawa pemohon dihalang daripada 'approbating' dan 'reprobating' dengan cara menyertai sebahagian proses semakan/penilaian semula CIDB dan setelah itu mendakwa bahawa kononnya CIDB telah melanggar perintah SK tersebut melalui proses yang sama (lihat perenggan 55–56 & 58).

(7) Mahkamah berpendapat bahawa remedi-remedi alternatif berikut tersedia untuk pemohon: (a) pemohon boleh memberikan butiran yang diperlukan kepada CIDB; dan (b) pemohon boleh mencabar levi bertarikh 25 Julai 2023 tersebut atau levi yang dikeluarkan oleh CIDB selepas selesai proses semakan/penilaian semula melalui cara lain termasuk melalui permohonan semakan kehakiman yang baru. Mahkamah berpandangan bahawa prosedur penghinaan mahkamah harus digunakan dengan berhati-hati dan pemohon sepatutnya

menggunakan prosiding pengkomitan sebagai pilihan terakhir (lihat perenggan 59–61).

(8) Berdasarkan alasan-alasan di atas, mahkamah mendapati bahawa pemohon telah gagal menunjukkan kes prima facie penghinaan terhadap penghina-penghina yang dicadangkan (lihat perenggan 62).]

Cases referred to

Dato' Oon Ah Baa & Ors v Eagle & Pagoda Brand Teck Aun Medical Factory & Ors [2003] MLJU 291; [2003] 3 MLRH 13; [2003] 7 CLJ 81, HC (refd)

Dewan Perniagaan Melayu Malaysia Negeri Johor v Menteri Besar Johor & Ors [2016] 7 MLJ 1; [2016] 2 MLRH 31; [2016] 1 CLJ 52, HC (refd)

Greenpower Value Sdn Bhd v Universal Trustee & Ors [2020] MLRHU 1618; [2020] 10 CLJ 462, HC (refd)

Grenek Sdn Bhd v Lew Wa Chow [1991] 1 MLJ 125; [1990] 2 MLRH 113; [1990] 2 CLJ 80, HC (refd)

Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565; [1997] 1 MLRA 284; [1997] 3 CLJ 305, FC (refd)

Loh Eng Leong & Anor v Lo Mun Sen & Sons Sdn Bhd & Anor [2003] 4 MLJ 284; [2003] 2 MLRA 148; [2003] 4 CLJ 743; [2002] 2 AMR 1593, CA (refd)

Mukhriz Mahathir v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak [2018] 3 MLJ 715; [2019] 2 MLRA 64; [2018] 6 CLJ 573, CA (refd)

R (on the application of Ali) v Secretary of State for the Home Department [2003] EWHC 899 (Admin), QBD (refd)

Regina v Secretary of State for Education, ex parte Prior [1994] ELR 231, QBD (refd)

Shencourt Sdn Bhd v Wanfy (M) Sdn Bhd [2014] MLRAU 336; [2014] 1 LNS 1101, HC (refd)

Tan Kong Ho v Mao Sheng Marketing (M) Sdn Bhd & Ors [2015] MLRHU 83; [2015] 4 CLJ 113; [2015] 5 AMR 146, HC (refd)

Tang Kong Ho v Mao Shen Marketing (M) Sdn Bhd & Ors [2015] 4 CLJ 125, HC (refd)

Wee Choo Keong v MBF Holdings Bhd & Anor and another appeal [1993] 2 MLJ 217; [1993] 1 MLRA 260; [1993] 3 CLJ 210; [1993] 2 AMR 1205, SC (refd)

Legislation referred to

Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994
Rules of Court O 52 r 3, 3(2)

Hor Shirley (with Marc Adrian Emuang) (Raja Darryl & Loh) for the applicant.
David Mathew (with Chong Jen Hui and David Ng Yew Kiat) (Steven Thiru & Sudhar Partnership) for the respondents.

Ahmad Kamal J:

INTRODUCTION

[1] The applicant filed an application under O 52 r 3 of the Rules of Court ('the ROC') 2012 (encl 86) and/or the inherent jurisdiction of this honourable court for the following orders:

(a) that the applicant be granted leave to make an application to this honourable court for an order of committal against:

(i) Lembaga Pembangunan Industri Pembinaan Malaysia, the abovenamed respondent ('CIDB'); and

(ii) Zahidi bin Hashim (NRIC No 770618–04–5499) as the General Manager of the Levy Management Department (*Bahagian Pengurusan Levi*) of the abovenamed respondent,

(collectively, 'the proposed contemnors').

[2] After the hearing, I dismissed the applicant's application in encl 86. This is my judgment setting out the full reasons for my decision.

BACKGROUND FACTS

[3] Based on the statement under O 52 r 3(2) of the ROC dated 29 November 2023 (encl 87), the background facts can be summarised as follows:

(a) under the concession agreement (with respect to the provision of Hospital Support Services at Contract Hospital in the States of Perak, Pulau Pinang, Kedah and Perlis) dated 1 April 2015 ('concession agreement') entered into between the applicant and the Government of Malaysia as represented by the Ministry of Health ('MOH'), the applicant was appointed to provide the following services to MOH:

(i) facility engineering management services ('FEMS');

(ii) facility management services ('FMS');

(iii) biomedical engineering maintenance services ('BEMS');

(iv) cleaning services ('CLS');

(v) healthcare waste management services ('HWMS'); and

(vi) linen and laundry services ('LLS');

(b) by the CIDB's Form CIDB L2/96 (notification of imposition of levy form) dated 30 September 2020, the CIDB imposed a levy in the sum of

RM2,957,520.90 on FEMS, BEMS and CLS scope of services under the concession agreement ('first levy');

(c) the applicant was aggrieved by the CIDB's decision on the first levy as if at all, only part of the FEMS services, and not the other scope of services under the concession agreement may fall within the ambit of 'construction works'. In this regard, BEMS and CLS services do not consist of any 'construction works';

(d) however, the CIDB took the position that it was entitled to impose a levy on the entire concession agreement value for all services mentioned above provided by the applicant to the MOH;

(e) in view of the circumstances, the applicant initiated the application for Judicial Review No WA-25–402–12 of 2020 in the Kuala Lumpur High Court for leave to apply for, and thereafter proceed with judicial review proceedings ('JR application') against the first levy imposed by the CIDB;

(f) by High Court order dated 16 February 2021, this honourable court granted leave to the applicant to commence judicial review proceedings against the CIDB and to seek the following reliefs:

(i) an order of certiorari to quash and/or set aside the first levy; and

(ii) an order of mandamus to compel the CIDB to review/reassess the levy payable by the applicant for the FEMS services under the concession agreement if any, by taking into account:

(1) the scope of the construction works under the concession agreement;

(2) the value of the construction works under the concession agreement taking into account the loose assets and vehicle values (which ought to be excluded); and

(3) the applicable post warranty maintenance rates in the concession agreement,

(collectively, 'JR relief');

(g) in short, the applicant took the following positions and/or arguments in the JR application:

(i) only a portion of the FEMS scope of services (excluding the values of loose assets and vehicles) if at all, falls within the Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994 ('the CIDB Act') definition of 'construction works' and therefore, any levy imposed ought to be limited only to the value of such scope;

(ii) the CIDB acted ultra vires the CIDB Act when it imposed the first levy on: (A) the scope of services that had no aspect of

'construction works'; and (B) non-construction works related components of the FEMS scope of services ie loose assets and vehicles;

(iii) the first levy was amenable to judicial review as the appellant was aggrieved by the first levy and it caused injustice to the appellant. Neither the CIDB Act nor the applicable regulations provide for any appeal mechanisms against the imposition of the first levy; and

(iv) the first levy was erroneous, irrational, unreasonable and illegal because it was imposed on non-construction works and was against the CIDB Act and regulations. The CIDB's subsequent arguments that it was 'provisional' did not change this fact.

(h) on the other hand, the CIDB took the following positions and/or arguments in the JR proceedings:

(i) the CIDB was correct in imposing the first levy as it was at liberty to impose levy on the entire concession agreement sum for all services under the concession agreement ie on the contract values for FEMS, FMS, BEMS, CLS, HWMS and LLS;

(ii) the first levy was provisional in nature and subject to revision and amendments at the end of the concession agreement's period; and

(iii) the first levy was not amenable to judicial review because it was provisional in nature;

(i) the High Court allowed the JR application on 24 January 2022. The JR order reads as follows:

> 1. Suatu perintah certiorari untuk membataikan dan/atau mengetepikan keputusan Responden dalam pengenaan levi sebanyak RM2,957,520.90 yang terkandung dalam Borang CIDB L2/96 (Borang Pemberitahuan Pengenaan Levi) bertarikh 30 September 2020.
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> 2. Suatu perintah mandamus supaya Responden hendaklah menyemak/menilai semula levi yang hams dibayaroleh Pemohon untuk perkhidmatan FEMS di bawah Perjanjian Konsesi (berkenaan dengan Pembekalan Perkhidmatan Sokongan Hospital di Hospital-Hospital Kontrak di Negeri Perak, Pulau Pinang, Kedah dan Perlis) bertarikh 1 April 2015 ('Kontrak') yang dimasuki oleh Pemohon dan Kerajaan Malaysia yang diwakili oleh Kementerian Kesihatan Malaysia, sekiranya perlu dibayar, dengan mengambil kira:
>
> 2.1 skop kerja-kerja pembinaan di bawah Kontrak; dan
>
> 2.2 niiai kerja-kerja pembinaan di bawah Kontrak dengan mengambil kira nilai 'loose assets' dan kenderaan-kenderaan (yang seharusnya dikecualikan), dan Kadar Penyelenggaraan Pasca Jaminan ('Post Warranty Maintenance Rate') yang digunapakai dalam kontrak.

3. Levi berjumlah RM2,957,520.90 hendaklah dibayar balik oleh Responden kepada Pemohon dalam masa (30) hah dari tarikh Perintah termeterai ini diserahkan kepada Responden.

4. Responden dikehendaki membayar Pemohon kos sebanyak RM10,000 tertakluk kepada fi alokatur.

GROUNDS FOR COMMITTAL

[4] By an email dated 19 April 2023, the CIDB invited the applicant to attend a 'discussion session' in relation to the concession agreement, at the CIDB's branch office at Menara Sunway Putra on 8 May 2023.

[5] During the 'discussion session' of 8 May 2023, the following matters transpired:

(a) the CIDB directed the applicant to declare the concession agreement on the respondent's centralised information management system ('CIM system') by or before 6 June 2023;

(b) in this connection, the application was required to declare the concession agreement sum/concession agreement value for the entire concession's agreement concession period which the applicant considered to be amenable to imposition of levy under the CIDB Act;

(c) although the concession agreement sum/concession agreement value for the entire concession period had to be declared (thus resulting in the imposition of a full levy,) the CIDB explained that it would consider allowing for the levy sum for the remaining concession period, to be paid by way of installments; and

(d) when the concession agreement and concession sum/concession value is declared, the application may include/enclose an 'explanation letter' to explain the basis of the concession agreement sum/concession agreement value computed and declared by the applicant.

[6] By a letter dated 2 June 2023 which was uploaded to the CIDB's CIM system and issued by hand to the CIDB, the applicant provided the CIDB with its explanations about the basis for the concession agreement sum/concession agreement value declared along with the amount of levy payable under the concession agreement, if any. In essence, it was explained that:

(a) save for the FEMS scope of services, all other services provided concession agreement under the (ie BEMS, FMS, CLS, LLS and HWMS) do not have any element of 'construction works' and therefore should not be subjected to the imposition of the levy;

(b) only the FEMS scope, if any, may have elements of 'construction works'

as it generally covers the maintenance of assets and hospital equipment such as buildings, mechanical and electrical engineering systems, sites and landscapes;

(c) however, the values for loose assets and vehicles under FEMS should also be excluded from the imposition of the levy as such items do not involve, relate, support or form an integral part of any 'construction works';

(d) in fact, by the High Court JR order dated 24 January 2022, it was ordered, amongst other things, that any levy to be imposed shall only be imposed on the value of construction works under the concession agreement (ie FEMS) with the exclusion of the value of loose assets and vehicles; and

(e) as such, on that premise, the concession agreement sum/concession agreement value to be declared is RM1,031,202,157.17, while the amount of levy to be imposed if any would be RM1,289,022.70 (ie 0.125% of the declared concession agreement sum/concession agreement value of RM1,031,202,157.17).

[7] Along with the said, letter, the applicant declared the concession agreement sum/concession agreement value of RM1,031,202,157.17 on the CIDB's CIM system.

[8] Subsequent thereto, on 6 June 2023, the CIDB issued Form CIDB L2/96 (Serial No HQL0006287/2023), wherein the CIDB acknowledged the concession agreement sum/concession agreement value of RM1,031,202,157.17 as declared by the applicant and imposed a levy in the sum of RM1,289,002.70 which was to be paid by or before 5 July 2023 ('6 June levy'). The CIDB followed up with an email dated 7 June 2023 to inform the applicant of the 6 June levy imposition.

[9] However, on 8 June 2023, the applicant was shocked to discover that the 6 June levy had been cancelled and the levy amount on the CIDB's CIM system had been changed from RM1,289,002.70 to RM0. The applicant downloaded a form CIDB L2/96 which bears the same exact serial number as the 6 June levy previously issued, but the new form showed a RM0 levy amount, with a levy imposition date of 8 June 2023 ('8 June levy').

[10] By email dated 8 June 2023, the applicant queried the CIDB on the cancellation of the 6 June levy, to which the CIDB replied that the 6 June levy had been cancelled (*dibatalkan*) as the applicant purportedly failed to declare the concession agreement in accordance with a 'garis panduan pengurusan fasiliti hospital' ('guidelines') and that another levy will be re-imposed.

[11] Thereafter, Zahidi Hashim, on behalf of the CIDB, issued a letter dated 23 June 2023 (which was only received by the applicant on 3 July 2023) in which, the CIDB:

(a) claimed that the applicant's declaration on 5 June 2023 was not in accordance with the guidelines issued by the CIDB for hospital facilities management works (which the CIDB claimed to be in accordance with the High Court JR order dated 24 January 2022. In view of this, the 8 June levy was cancelled (*dibatalkan*);

(b) instructed the applicant to furnish information on the entire cost of the scope of facility management works ie for FMS, FEMS, BEMS, LLS, HWMS and CLS scopes of services;

(c) 'reminded' the applicant that hospital facility management works amounts to construct works under the category of maintenance; and

(d) informed the applicant that if further information is provided within 30 days of the date of the CIDB said letter, the CIDB has the right to impose a levy on the entire facility management works concession agreement value under the concession agreement.

[12] As the CIDB's letter dated 23 June 2023 was only received by the applicant on 3 July 2023, the applicant endeavored to respond to the CIDB within 30 days of its receipt of the same (ie by or before 2 August 2023). In this regard, the applicant responded by its letter dated 28 July 2023 (acknowledged as received by the CIDB on the same date). In the applicant's said letter, amongst other things:

(a) the applicant reiterated its position on the concession agreement sum/concession agreement value which ought to be declared and consequently the levy amount which may be imposed by the CIDB on the concession agreement;

(b) the applicant provided the information regarding the costs of the scope of facility management works under the concession agreement;

(c) the applicant reiterated that any levy to be imposed ought to be done in accordance with the terms of the High Court JR order dated 24 January 2022 and the CIDB's statement that the guidelines is in accordance with the said High Court JR order, is incorrect and untrue;

(d) the applicant stated that there are no provisions under the CIDB Act which provide that any 'hospital facility management works' will automatically fall within the definition of 'construction works' under the CIDB Act. The CIDB has a duty under the CIDB Act and the regulations to determine which part of the 'hospital facility management works' consist of the element of 'construction works' and the value thereof that is amenable to levy; and

(e) the applicant reminded the CIDB that: (i) the above matters had already been argued and disposed of in the JR application; and (ii) in accordance with the High Court JR order dated 24 January 2022, it is clear that in computing the amount of levy payable, amongst other things, the CIDB ought to only consider the value of FEMS services only with the exclusion of the value of loose assets and vehicles.

[13] However, before the applicant was able to issue its letter dated 28 July 2023, Zahidi Hashim, on behalf of the CIDB, issued a letter dated 25 July 2023, informing the applicant that a levy in the sum of RM2,957,520.90 been imposed on the concession agreement through Form CIDB L2/96 (Serial No HQL0006287/2023) with a levy imposition date of 25 July 2023 and date of liability for payment by 23 August 2023 ('25 July levy'):

(a) the CIDB, through Zahidi Hashim, further explained that the 25 July levy was imposed on the FEMS, BEMS and CLS scope of services under the concession agreement and the final computation of the levy shall include FMS, LLS and HWMS which will be reassessed at the end of the concession period.

[14] By a letter dated 11 August 2023, Zahidi Hashim, on behalf of the CIDB, replied to the applicant's letter dated 28 July 2023, to amongst other things, assert that:

(a) the 25 July Levy had been imposed as the CIDB did not receive any response to its letter dated 25 July 2023 within 30 days of the date of the said letter;

(b) the applicant has not given any evidence to support its assertion that loose assets and vehicles are not for the purpose of maintaining the 'functions' of the facilities as a hospital;

(c) the applicant has not given detailed information of the works/services carried out under FMS, BEMS, LLS, HWMS and CLS for the CIDB's consideration and failing which, the CIDB is entitled to impose a levy on the entire costs of the aforementioned services; and

(d) the applicant is given 21 days from the date of the CIDB's said letter to present detailed information/reasons on any other costs that should be excluded from the levy, as outlined in the purported guidelines (which was not enclosed with the CIDB's said letter).

[15] By a letter dated 18 August 2023, the applicant responded: (a) that the applicant will respond within 21 days as requested by the CIDB; and (b) to clarify whether in light of which, the 25 July levy was still applicable or retracted.

[16] By a letter dated 24 August 2023, Zahidi Hashim, on behalf of the CIDB replied to clarify that the 25 July levy remains.

[17] By the applicant's letter dated 30 August 2023 which was in response to the CIDB's letter dated 11 August 2023, the applicant provided the list of loose assets and vehicles to the CIDB and further stated that:

(a) if the CIDB were to go through the list of loose assets and vehicles, it would become clear that they are not related to 'construction works' as defined under the CIDB Act, wherein it is clear that a levy can only be imposed on concession agreement sums for 'construction works' only and not on concession agreement sums for works where the purpose is for maintaining the 'functions' of facilities as a hospital;

(b) the applicant's position is that the guidelines is contradictory to the CIDB Act, the laws and relevant regulations as well as the High Court JR order dated 24 January 2022;

(c) with regard to the CIDB's request for information relating to the works/services carried out under FMS, BEMS, LLS, HWMS and CLS — the applicant sought clarification from the CIDB as to the specific details that it required. This is because the matter relating to these scopes had already been addressed in the JR application and the matter was decided in the applicant's favor that the CIDB is not entitled to impose a levy on these scopes of services. This is clear from the cause papers, submissions, arguments and the High Court JR order dated 24 January 2022; and

(d) as such, the CIDB was requested to retract the 25 July levy and abide by the terms of the High Court JR order dated 24 January 2022 in determining/computing the levy that ought to be imposed on the concession agreement.

[18] About a month thereafter, the CIDB issued a letter dated 21 September 2023 to the applicant, wherein amongst other things, the CIDB requested the applicant to provide information or copies of proof of payments made by the applicant to MOH for the LLS and HWMS scopes of services, under the guise that the CIDB was purportedly 'assessing' (*meneliti*) the applicant's alleged 'claims for levy exemption' (*tuntutan pengecualian levy*).

[19] By a letter dated 17 October 2023, amongst other things, the applicant questioned how the CIDB's requests for the aforementioned payment related information and documents could possibly assist the CIDB in determining whether the LLS and HWMS services fall under the CIDB Act's definition of 'construction works', and should therefore be 'exempted' from being levied or not.

[20] Subsequently, a meeting was held between the parties on 2 November 2023. However, no resolution was achieved between parties as the CIDB remained adamant on its position in relation to the 25 July levy, again despite the applicant's explanations and justifications which were reiterated during the said meeting. To date, the CIDB has refused to retract and instead still maintains the 25 July levy.

[21] In the circumstances, according to the applicant, the CIDB and its officer/representative Zahidi Hashim, have acted in contempt of the High Court JR order dated 24 January 2022 by imposing the 25 July levy on the concession agreement and refusing to retract the same despite repeated requests. In this respect:

(a) the 25 July levy is identical in value and basis to the first levy, which had been quashed by this honourable court through the certiotari order made in the High Court JR order dated 24 January 2022 (whereby both the first levy and 25 July levy were imposed on the entire costs of the FEMS, BEMS and CLS scope of services); and

(b) the CIDB failed, refused and/or neglected to review/reassess the levy sum that ought to be imposed in accordance with the mandamus order given in the High Court JR order dated 24 January 2022 whereby it was mandated that any levy imposed by the CIDB should be confined only to the value of construction works under the FEMS scope of services, with the exclusion of loose assets and vehicles. No levy ought to be imposed on the FMS, BEMS, LLS, CLS and HWMS scope of services as these are not 'construction works'.

[22] The applicant's solicitors demanded that the CIDB immediately retract the 25 July levy which is in breach of the High Court JR order dated 24 January 2022, failing which committal proceedings may be commenced against the CIDB and its officers/representatives who have caused and/or willfully permitted or contributed to any such acts of contempt of court.

[23] By a letter dated 16 August 2023, Messrs Steven Thiru and Sudhar Partnership, the same solicitors that acted for the CIDB in the JR application, replied on behalf of the CIDB, in essence, to deny that any acts of contempt had been committed by the CIDB. A copy of the guidelines was enclosed with the said letter.

[24] In the circumstances, according to the applicant an order for committal for contempt of court ought to be made against the CIDB and Zahidi Hashim as the officer/representative who caused and/or willfully permitted or contributed to the CIDB's acts of contempt of court complained of by the applicant.

CIDB CONTENTION

[25] Essentially, the CIDB argues that the applicant has failed to establish a prima facie case of contempt against the proposed contemnors:

(a) the CIDB had complied with the express terms of the High Court JR order dated 24 January 2022;

(b) the committal leave application was filed prematurely and amounts to an abuse of court process;

(c) the applicant failed to make full and frank disclosure of material facts favorable to the proposed contemnors;

(d) the applicant is aware of the 'ongoing review/reassessment exercise' carried out by the proposed contemnors; and

(e) there are alternative remedies available to the applicant to challenge the new levy No 3 dated 25 July 2023 upon the conclusion of the renewal/reassessment of the payable levy.

PRIMA FACIE CASE OF CONTEMPT

[26] In *Wee Choo Keong v MBF Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217; [1993] 1 MLRA 260; [1993] 3 CLJ 210; [1993] 2 AMR 1205 Abdul Hamid Omar LP (as His Lordship then was), delivering the judgment of the then Supreme Court, stated as follows:

> In the appeals before us, leave to issue committal proceedings has been granted. This means that the learned High Court Judge has accepted that there was a prima facie case for contempt against the appellants. It may well be that on the hearing of the Motion proper, the appellants will be acquitted of any charge of contempt ...

[27] The High Court in *Dato' Oon Ah Baa & Ors v Eagle & Pagoda Brand Teck Aun Medical Factory & Ors* [2003] MLJU 291; [2003] 3 MLRH 13; [2003] 7 CLJ 81 made the following observation:

> In other words, the test required to be met before leave is granted is that the applicant must satisfy that there is a prima facie case of contempt ...

[28] Thus, the test required to be met before the leave is granted is that the applicant must satisfy the court that there is a prima facie case of contempt (see also: *Mukhriz Mahathir v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak* [2018] 3 MLJ 715; [2019] 2 MLRA 64; [2018] 6 CLJ 573; *Dewan Perniagaan Melayu Malaysia Negeri Johor v Menteri Besar Johor & Ors* [2016] 7 MLJ 1; [2016] 2 MLRH 31; [2016] 1 CLJ 52).

[29] In *Tang Kong Ho v Mao Shen Marketing (M) Sdn Bhd & Ors* [2015] 4

CLJ 125, the court set out the test to establish a prima facie case of contempt:

> [c] a prima facie case of contempt of court is satisfied if:
>
> (i) the statement and verifying affidavit show that the respondent in question has committed a species of contempt of court, for example, the respondent has:
>
> (1) breached an injunction or court order;
>
> (2) breach an undertaking to court;
>
> (3) scandalised the court;
>
> (4) interfered with the due administration of justice or perverted the course of justice in relation to pending proceedings; and
>
> (5) published or disseminated publication which interferes with the course of justice in pending proceedings, namely sub justice publication or sub judice dissemination of publication.

THE DECISION OF THE COURT

[30] Having perused the statement and the cause papers presented before the court, I am of the view that the applicant had failed to establish a prima facie case of contempt against the proposed contemnors.

CIDB COMPLIED WITH THE HIGH COURT JR ORDER

[31] I find that the proposed contemnors had complied with the High Court JR order dated 24 January 2022:

(a) pursuant to para 3 of the High Court JR order, on 14 February 2022, CIDB refunded the first levy to the applicant; and

(b) pursuant to para 4 of the High Court JR order, on 21 February 2022, the CIDB made payment of the costs and allocator fee to the applicant.

[32] This court finds that to comply with para 2 of the High Court JR order, CIDB has to determine the payable levy as part of the review/reassessment exercise. A series of correspondences and discussions were held between both parties to ascertain the following two elements:

(a) whether scopes of services fall under the definition of 'construction works' and therefore subject to levy; and

(b) whether actual work was carried out by the applicant under the concession agreement.

[33] Based on the chronology of events as stated in the cause papers, I find that:

A (a) the review reassessment exercise pursuant to para 2 of the High Court JR order is still ongoing;

(b) the levy dated 25 July 2023 was imposed due to the applicant's failure to furnish the required particulars within the stipulated timeline;

B (c) the applicant has yet to furnish the required particulars for CIDB to determine the levy payable; and

(d) the final levy payable is pending determination by CIDB.

C **[34]** Based on the above, this court finds that the CIDB has complied with parts of the High Court JR order (paras 3 and 4) and in the process of complying with para 2 of the JR order.

[35] I find that the CIDB is not able to complete its compliance with para 2 D of the High Court JR order ie to complete the review/reassessment of the payable levy, due to the applicant's conduct by failing, refusing and/or neglecting to disclose or furnish the required particulars which are necessary for CIDB to complete the said review/reassessment.

E **[36]** This court finds that the issuance of the levy dated 25 July 2023 is not in contravention of the High Court JR order as CIDB has, at all material times, informed the applicant that it is pending further particulars from the applicant for the process of review/reassessment to be completed, even after the issuance F of the levy dated 25 July 2023.

[37] More importantly, upon perusal of the High Court JR order this court finds that there is no specified time for CIDB to complete the renewal/reassessment of the payable levy.

G **[38]** Case laws seem to suggest that failure to specify time for doing an act in the order is fatal to committal proceedings.

[39] The Court of Appeal in *Loh Eng Leong & Anor v Lo Mun Sen & Sons Sdn* H *Bhd & Anor* [2003] 4 MLJ 284; [2003] 2 MLRA 148; [2003] 4 CLJ 743; [2002] 2 AMR 1593 held as follows:

> [10] … As it is one that must be done within a prescribed period *the time period must have been specified in it before it can be enforced. There is no compliance with this* I *requirement as the time period within which the act must he done has not been specified. Neither was there a supplemental order to fix a time period. The corollary is that the appellants are not entitled to have the panel notice indorsed in the order*. The application before us is therefore without merit. Accordingly, we dismissed it without the need to consider an adjournment as requested by the respondents. (Emphasis added.)

(See also: *Grenek Sdn Bhd v Lew Wa Chow* [1991] 1 MLJ 125; [1990] 2 MLRH 113; [1990] 2 CLJ 80 *Dewan Perniagaan Melayu Malaysia Negeri Johor*.)

[40] Further, I find that the applicant's contention that no levy ought to be imposed on the FMS, BEMS, LLS, CLS and HWMS scopes of services is not supported by the express terms of the High Court JR order.

[41] Upon perusal of the High Court JR order, this court finds that the express terms of the High Court JR order:

(a) does not require the review/reassessment of the payable levy to be done by excluding the FMS, BEMS, LLS, CLS and HWMS scopes of services from the definition of 'construction works' under the CIDB Act; and

(b) does not require the review/reassessment of the payable levy to be confined to the FEMS scope of services.

[42] It is untenable for the applicant to suggest that the High Court vide the High Court JR order had fettered CIDB's exercise of its statutory powers in determining the payable levy.

[43] Based on the present facts, I find that the imposition of the levy dated 25 July 2023 is due to the applicant's failure to disclose or furnish further particulars for CIDB to complete the review/reassessment of the payable levy. It is therefore not identical in basis and/or circumstances as the first levy.

[44] Further, I find that the High Court JR order also does not prohibit CIDB from arriving at a levy which is identical in value upon a review/reassessment.

[45] On this issue, I am in agreement with the submission of the CIDB that a decision-maker is entitled to reach exactly the same decision by a different route upon the first decision being quashed.

(See *R (on the application of Ali) v Secretary of State for the Home Department* [2003] EWHC 899 (Admin); *Regina v Secretary of State for Education, ex parte Prior* [1994] ELR 231.)

[46] Therefore, I view that the grounds raised by the applicant do not relate to the express terms of the JR order nor the spirit of the JR order.

PREMATURE

[47] The chronology of events as happened in the present case clearly shows that the applicant, was at all material times, informed that CIDB's review/reassessment of the payable levy under para 2 of the High Court JR order has not concluded and that further particulars are required from the applicant for CIDB to complete the said review/reassessment.

[48] In fact, the chronology of facts shows that even after the imposition of the levy dated 25 July 2023, CIDB maintained its position that it is still considering the applicant's request for the exclusion of levy and requested for further particulars from the applicant which the applicant failed, refused and/or neglected to provide the same to CIDB.

[49] Given the above, I am of the view that encl 86 is premature and an abuse of the court process and does not disclose a prima facie case for contempt as it is calculated to prevent the CIDB from exercising its statutory duty under the CIDB Act based on the following facts:

(a) the applicant does not agree with the definition of leviable 'construction works' under the CIDB Act, despite the High Court not making any finding in respect of what falls within the definition of 'construction works' under the CIDB Act;

(b) the applicant continuously defies CIDB's request for further particulars in order to complete the review/reassessment of the payable levy;

(c) the applicant's conduct is premised on its own decision that the required particulars relate to works that do not fall within the definition of leviable 'construction works' under the CIDB Act;

(d) instead of facilitating the completion of CIDB's review/reassessment of the payable levy, the applicant has, by its own conduct, caused a halt in the process of review/reassessment; and

(e) the applicant was at all material times aware that despite the issuance of the levy dated 25 July 2023, the review/reassessment of the payable levy has not been completed and CIDB required further particulars to complete the review/reassessment.

FULL AND FRANK DISCLOSURE

[50] The importance of full and frank disclosure in an application for leave to commence contempt proceedings was stated in *Greenpower Value Sdn Bhd v Universal Trustee & Ors* [2020] MLRHU 1618; [2020] 10 CLJ 462 when the High Court held as follows:

[67] While the *requirement of* full *and frank disclosure* is one which is common to any ex parte application, the requirement *becomes even more critical in cases where the outcome is to initiate contempt proceedings*. (Emphasis added.)

[51] Given the above, I am of the view that it is the applicant's duty to make full and frank disclosure in their statement and affidavit of all relevant facts, especially those favorable to CIDB and second proposed contemnor.

[52] However, I find that the details and justification provided by CIDB for the issuance of the levy dated 25 July 2023, particularly CIDB's position that the review/reassessment exercise has yet to be completed (despite the issuance of the levy dated 25 July 2023), were not all disclosed by the applicant.

[53] The applicant's failure to make full and frank disclosure of all the relevant material facts can be seen as follows:

(a) the applicant failed to disclose that CIDB had refunded the first levy to the applicant and made payment of costs and allocator fee to the applicant, which would have clearly shown CIDB's compliance with the High Court JR order;

(b) the applicant failed to disclose that the applicant attended a discussion with CIDB on 18 August 2023 in which it would have shown CIDB's explanation of its policy in determining the elements which fall within the definition of 'construction works' under the CIDB Act; and

(c) the applicant failed to disclose that CIDB had issued a statutory N2/2015 notice dated 1 December 2023 to compel the applicant to disclose or furnish the required particulars to facilitate CIDB's completion of the review/reassessment of the payable levy and parties' subsequent communication in respect of the said statutory notice. This would have demonstrated that CIDB had exhausted all available options in order to comply with the High Court JR order.

[54] This court is of the view that the applicant's conduct can be construed as a deliberate suppression of facts and a serious abuse of the court process.

(See: *Shencourt Sdn Bhd v Wanfy (M) Sdn Bhd* [2014] MLRAU 336; [2014] 1 LNS 1101.)

THE APPLICANT IS AWARE OF CIDB'S REVIEW/REASSESSMENT EXERCISE

[55] CIDB has, at all material times, informed the applicant that it is pending further particulars from the applicant for the process of

review/reassessment to be completed (including after the issuance of the levy dated 25 July 2023).

[56] After the issuance of the levy dated 25 July 2023, the applicant was still in communication with GIDB in respect of the required particulars and even provided a list of loose assets and vehicles within the FEMS scope of services to CIDB which it was of the view that ought to be excluded.

[57] The Federal Court in the case of *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565; [1997] 1 MLRA 284; [1997] 3 CLJ 305 held as follows:

> [52] In the context of litigation, it usually arises where a party to an action has at least two alternative and mutually exclusive courses open to him. *If by words or conduct he elects to pursue one of them and thereby leads his opponent to believe that he has abandoned the other, he may, if the circumstances so warrant, be precluded from later changing course*. (Emphasis added.)

[58] Given the above, this court is of the view that the applicant is precluded from approbating and reprobating through partially participating in CIDB's review/reassessment of the levy payable and thereafter contending that CIDB had allegedly breached the High Court JR order by the very same process.

ALTERNATIVE REMEDIES AVAILABLE TO THE APPLICANT

[59] It is to be noted that the CIDB has not completed its review/reassessment of the levy payable as it is pending the applicant disclosing and furnishing the required particulars. As such, this court is of the view that there are alternative remedies available to the applicant by providing the required particulars to CIDB.

[60] Even if the applicant is dissatisfied with the issuance of the levy dated 25 July 2023 or the levy issued by CIDB upon the conclusion of CIDB's review/reassessment of the payable levy, this court is of the view that the applicant is able to challenge the same through other avenues, including by way of a fresh judicial review application.

[61] This court is of the considered view that contempt of court should be exercised sparingly and the applicant should have resorted to committal proceedings in this case as a last resort.

(See: *Tan Kong Ho v Mao Sheng Marketing (M) Sdn Bhd & Ors* [2015] MLRHU 83; [2015] 4 CLJ 113; [2015] 5 AMR 146.)

CONCLUSION

[62] Premised on the reasons mentioned above, this court finds that the applicant has failed to show a prima facie case of contempt against the proposed contemnors.

[63] As such, I dismissed the applicant's application for leave to commence committal proceedings against the proposed contemnors with costs of RM5,000 subject to the allocator.

Applicant's application for leave to commence committal proceedings against proposed contemnors dismissed with costs of RM5,000 subject to allocator.

Reported by Dzulqarnain Ab Fatar